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SENATE BILL

No. 1436

Introduced by Senator Murray

(Coauthors: Senators Bowen and Romero)

(Coauthors: Assembly Members Chavez, Shirley Horton, Koretz,
Jackson, and Nation)

February 19, 2004

An act to add Chapter 32 (commencing with Section 22947) to Division 8 of the Business and Professions Code, relating to business, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 1436, as amended, Murray. Computer spyware.

Existing law provides for the regulation of various businesses by the Department of Consumer Affairs. No existing law provides for the regulation of computer spyware.

This bill would ~~make it unlawful for~~ *prohibit* a person or entity other than the authorized user of a computer owned by a person in California ~~to cause the installation of spyware, as defined, on that computer unless the person provides a notice meeting specified requirements. The bill would, with specified exceptions, authorize the authorized user of a computer or the Internet service provider to bring an action to recover~~

~~actual damages for a violation of this requirement, and would authorize these parties to recover liquidated damages of \$1,000 per violation, subject to reduction by a court for specified reasons. The bill would provide for an award of reasonable attorney's fees and costs to a prevailing plaintiff from, with actual knowledge, conscious avoidance of actual knowledge, or willfully, causing computer software to be copied onto the computer and using the software to (1) take control of the computer, as specified, (2) modify certain settings relating to the computer's access to or use of the Internet, as specified, (3) collect, through intentionally deceptive means, personally identifiable information, (4) prevent, without authorization, an authorized user's reasonable efforts to block the installation of or disable software, as specified, (5) intentionally misrepresent that the software will be uninstalled or disabled by an authorized user's action, (6) induce an authorized user to install a software component, (7) through intentionally deceptive means, remove, disable, or render inoperative a security, antispyware, or antivirus technology installed on the computer, or (8) deceptively cause the copying and execution on the computer of software components with the intent of causing an authorized user to use the components in a way that violates any of these prohibitions.~~

~~This~~

~~The bill would provide that if any part of these provisions or their applications are held invalid, the invalidity would not affect other provisions.~~

~~This~~

~~The bill would declare that it is to take effect immediately as an urgency bill.~~

~~Vote: ²/₃. Appropriation: no. Fiscal committee: no. State-mandated local program: no.~~

The people of the State of California do enact as follows:

- 1 SECTION 1. *It is the intent of the Legislature that this act*
- 2 *protect California consumers from the use of spyware and malware*
- 3 *that is deceptively or surreptitiously installed on their computers.*
- 4 *Because the threats posed by these practices change over time, it*
- 5 *is the intent of the Legislature to revise the provisions in this act as*
- 6 *needed to fully protect consumers from additional unfair and*



1 *deceptive practices and to address future innovations in computer*
2 *technology and practices.*

3 SEC. 2. Chapter 32 (commencing with Section 22947) is
4 added to Division 8 of the Business and Professions Code, to read:

5
6 CHAPTER 32. CONSUMER PROTECTION AGAINST COMPUTER
7 SPYWARE ACT
8

9 22947. This chapter shall be known as and may be cited as the
10 Consumer Protection Against Computer Spyware Act.

11 22947.1. For purposes of this chapter, the following terms
12 have the following meanings:

13 (a) “Advertisement” means a communication, the primary
14 purpose of which is the commercial promotion of a commercial
15 product or service, including content on an Internet Web site
16 operated for a commercial purpose.

17 (b) “Authorized user,” with respect to a computer, means a
18 person who owns or is an authorized user of such computer. For
19 purposes of this chapter, in the case of an employer/employee
20 relationship, the employer of record is the authorized user.

21 ~~(b) “Cause the installation” means to select and place online~~
22 ~~at an online location available to the public, or directly to cause~~
23 ~~placement on a computer of computer software, or any executable~~
24 ~~component thereof, via the Internet or any other medium,~~
25 ~~including local area networks of computers, other nonwire~~
26 ~~transmissions, and disc or other data storage devices. This does not~~
27 ~~include an executable that is in compliance with this chapter if~~
28 ~~another, unrelated executable attaches to, through, or via another~~
29 ~~unrelated executable that did not cause its installation. authorized~~
30 ~~by the owner or lessee to use the computer. “Authorized user” does~~
31 ~~not include a person or entity that has obtained authorization to~~
32 ~~use the computer solely through the use of an end user license~~
33 ~~agreement.~~

34 (c) “Computer software” means a sequence of instructions
35 written in any programming language that is executed on a
36 computer.

37 ~~(d) “Execute,” “execution,” and “executable,” when used~~
38 (d) “Computer virus” means a computer program or other set
39 of instructions that is designed to degrade the performance of or
40 disable a computer or computer network and is designed to have

1 *the ability to replicate itself on other computers or computer*
2 *networks without the authorization of the owners of those*
3 *computers or computer networks.*

4 (e) “Consumer” means an individual who resides in this state
5 and who uses the computer in question primarily for personal,
6 family, or household purposes.

7 (f) “Damage” means any significant impairment to the
8 integrity or availability of data, software, a system, or information.

9 (g) “Execute,” when used with respect to computer software,
10 refers to means the performance of the functions or the carrying
11 out of the instructions of the computer software.

12 ~~(e) “First retail sale” means the sale of a computer, for a~~
13 ~~purpose other than resale, after the manufacture, production, or~~
14 ~~importation of the computer. For purposes of this chapter, the lease~~
15 ~~of a computer shall be considered a retail sale of the computer.~~

16 ~~(f)~~

17 (h) “Intentionally deceptive” means any of the following:

18 (1) By means of an intentionally false or fraudulent statement.

19 (2) By means of a statement or description that intentionally
20 omits or misrepresents material information in order to deceive the
21 consumer.

22 (3) By means of an intentional failure to provide any notice to
23 an authorized user regarding the download or installation of
24 software in order to deceive the consumer.

25 (i) “Internet” means the global information system that is
26 logically linked together by a globally unique address space based
27 on the Internet Protocol (IP), or its subsequent extensions, and that
28 is able to support communications using the Transmission Control
29 Protocol/Internet Protocol (TCP/IP) suite, or its subsequent
30 extensions, or other IP-compatible protocols, and that provides,
31 uses, or makes accessible, either publicly or privately, high level
32 services layered on the communications and related infrastructure
33 described in this subdivision.

34 ~~(g) “Internet service provider” means an entity offering~~
35 ~~transmission, routing, or access to the Internet.~~

36 ~~(h)~~

37 (j) “Person” means any individual, partnership, corporation,
38 limited liability company, or other organization, or any
39 combination thereof.

~~(i) “Personal information” means any of the following with regard to an authorized user:~~

~~(k) “Personally identifiable information” means any of the following:~~

~~(1) First name or first initial in combination with last name.~~

~~(2) Credit or debit card numbers.~~

~~(3) A password or personal identification number required to access a identified financial account.~~

~~(4) Social Security number.~~

~~(5) Any of the following information in a form that personally identifies an authorized user:~~

~~(A) Account balances.~~

~~(5)~~

~~(B) Overdraft history.~~

~~(6) Individually identifiable payment history.~~

~~(7) Personally identifiable history of Web sites visited.~~

~~(8) Social security number.~~

~~(9)~~

~~(C) Payment history.~~

~~(D) A history of Web sites visited.~~

~~(E) Home address.~~

~~(10)~~

~~(F) Work address.~~

~~(11)~~

~~(G) A record of a purchase or purchases.~~

~~(j) “Spyware” means a software program that self-executes on an authorized user’s computer and that is used without notice as described in Section 22947.2 to do any of the following:~~

~~(1) Collect and transmit personal information from an authorized user of the computer for a purpose wholly unrelated to the purpose of the software as described to an authorized user of the computer.~~

~~(2) Use the authorized user’s computer as part of an activity performed by a group of computers that causes damage to another computer, such as launching a denial of service attack.~~

~~(3) Deliver a pop-up on an authorized user’s computer that a reasonable computer user cannot close without turning off the computer or closing the user’s Internet browser software.~~

~~(4) Change the default home page of the computer user without the consent of the authorized user.~~

~~(5) Alter the Internet service provider of the person without the authorization of an authorized user.~~

~~(6) Use an authorized user's computer in a manner that causes the person to incur monetary charges that the authorized user has not authorized.~~

~~(7) Transmit or relay commercial electronic mail initiated by a person other than the authorized user without the authorization of the authorized user.~~

~~(k) "Web page" means a location that has a single Uniform Resource Locator with respect to the World Wide Web or other single location with respect to the Internet.~~

~~22947.2. (a) It is unlawful for any person, other than an authorized user, to surreptitiously cause the installation of spyware on a computer owned by a person in California, or on a computer prior to the first retail sale of that computer, if that computer software, or any executable component thereof is spyware, unless a notice meeting the requirements of subdivision (b) is provided by that person or by another person to the authorized user of the computer.~~

~~(b) (1) The notice required under subdivision (a) shall meet all of the following requirements:~~

~~(A) Be displayed clearly to the authorized user once, at the time the software is installed, or, in the case of preinstalled software or for software that is not activated upon installation, before the first time the software executes one of the functions described in subdivision (j) of Section 22947.1.~~

~~(B) State briefly that types of personal information, as described in subdivision (i) of Section 22947.1, the software collects and transmits.~~

~~(2) A notice is "displayed clearly" within the meaning of this subdivision if it is displayed separately from an electronic uniform license agreement and is both of the following:~~

~~(A) Written in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.~~

~~(B) Displayed so that a reasonable person would notice it.~~

~~(3) A single notice that applies to more than one software program satisfies the requirements of this section if the software~~

1 programs are provided to the authorized user together as part of a
2 group of software programs.

3 ~~22947.3. (a) (1) In addition to any other remedies provided~~
4 ~~by this chapter or any other provision of law, an authorized user~~
5 ~~who has spyware installed or receives computer software~~
6 ~~containing spyware in violation of Section 22947.2 or the Internet~~
7 ~~service provider may bring an action against the person or entity~~
8 ~~that violated Section 22947.2 to recover either or both of the~~
9 ~~following:~~

10 ~~(A) Actual damages.~~

11 ~~(B) Liquidated damages of one thousand dollars (\$1,000) for~~
12 ~~each instance of spyware installed, or computer software~~
13 ~~containing spyware provided, in violation of Section 22947.2.~~

14 ~~(2) The authorized user or the Internet service provider, if the~~
15 ~~prevailing plaintiff, may also recover reasonable attorney's fees~~
16 ~~and costs.~~

17 ~~(b) If the court finds that a defendant established and~~
18 ~~implemented, with due care, practices and procedures reasonably~~
19 ~~designed to effectively provide the notice required by Section~~
20 ~~22947.2, the court shall reduce the liquidated damages recoverable~~
21 ~~under subdivision (a) to a maximum of one hundred dollars (\$100)~~
22 ~~for each instance of spyware installed, or computer software~~
23 ~~containing spyware provided, in violation of this chapter.~~

24 ~~(c) There shall not be a cause of action under this section~~
25 ~~against an Internet service provider that is only involved in the~~
26 ~~routine transmission over its computer network of the computer~~
27 ~~software containing spyware.~~

28 *22947.2. A person or entity that is not an authorized user, as*
29 *defined in Section 22947.1, shall not, with actual knowledge, with*
30 *conscious avoidance of actual knowledge, or willfully, cause*
31 *computer software to be copied onto the computer of a consumer*
32 *in this state and use the software to do any of the following:*

33 *(a) Modify, through intentionally deceptive means, any of the*
34 *following settings related to the computer's access to, or use of, the*
35 *Internet:*

36 *(1) The page that appears when an authorized user launches an*
37 *Internet browser or similar software program used to access and*
38 *navigate the Internet.*

39 *(2) The default provider or Web proxy the authorized user uses*
40 *to access or search the Internet.*

1 (3) *The authorized user's list of bookmarks used to access Web*
2 *pages.*

3 (b) *Collect, through intentionally deceptive means, personally*
4 *identifiable information.*

5 (c) *Prevent, without the authorization of an authorized user,*
6 *through intentionally deceptive means, an authorized user's*
7 *reasonable efforts to block the installation of, or to disable,*
8 *software, by causing software that the authorized user has properly*
9 *removed or disabled to automatically reinstall or reactivate on the*
10 *computer without the authorization of an authorized user.*

11 (d) *Intentionally misrepresent that software will be uninstalled*
12 *or disabled by an authorized user's action, with knowledge that the*
13 *software will not be so uninstalled or disabled.*

14 (e) *Through intentionally deceptive means, remove, disable, or*
15 *render inoperative a security, antispyware, or antivirus technology*
16 *installed on the computer.*

17 (f) *Deceptively cause the copying and execution on the*
18 *computer of one or more additional computer software*
19 *components with the intent of causing an authorized user to use the*
20 *components in a way that violates any other provision of this*
21 *section.*

22 22947.3. *A person or entity that is not an authorized user, as*
23 *defined in Section 22947.1, shall not, with actual knowledge, with*
24 *conscious avoidance of actual knowledge, or willfully, cause*
25 *computer software to be copied onto the computer of a consumer*
26 *in this state and use the software to do any of the following:*

27 (a) *Take control of the consumer's computer by doing any of the*
28 *following:*

29 (1) *Transmitting or relaying commercial electronic mail or a*
30 *computer virus from the consumer's computer, where the*
31 *transmission or relaying is initiated by a person other than the*
32 *authorized user and without the authorization of an authorized*
33 *user.*

34 (2) *Accessing or using the consumer's modem or Internet*
35 *service for the purpose of causing damage to the consumer's*
36 *computer or of causing an authorized user to incur financial*
37 *charges that are not authorized by an authorized user.*

38 (3) *Using the consumer's computer as part of an activity*
39 *performed by a group of computers for the purpose of causing*

1 *damage to another computer, including, but not limited to,*
2 *launching a denial of service attack.*

3 *(4) Opening multiple, sequential, stand-alone advertisements*
4 *in the consumer's Internet browser with knowledge that a*
5 *reasonable computer user cannot close the advertisements without*
6 *turning off the computer or closing the consumer's Internet*
7 *browser.*

8 *(b) Modify any of the following settings related to the*
9 *computer's access to, or use of, the Internet:*

10 *(1) An authorized user's security or other settings that protect*
11 *information about the authorized user for the purpose of stealing*
12 *personal information of, or causing harm to, an authorized user.*

13 *(2) The security settings of the computer for the purpose of*
14 *causing damage to one or more computers.*

15 *(c) Prevent, without the authorization of an authorized user, an*
16 *authorized user's reasonable efforts to block the installation of, or*
17 *to disable, software, by doing any of the following:*

18 *(1) Presenting the authorized user with an option to decline*
19 *installation of software such that, when the option is selected by the*
20 *authorized user, the installation nevertheless proceeds.*

21 *(2) Falsely representing that software has been disabled.*

22 *(d) Induce an authorized user to install a software component*
23 *onto the computer, including, but not limited to, intentionally*
24 *either representing or misrepresenting that installing software is*
25 *necessary for security or privacy reasons or in order to open, view,*
26 *or play a particular type of content.*

27 22947.4. It is the intent of the Legislature that this chapter is
28 a matter of statewide concern. This chapter supersedes and
29 preempts all rules, regulations, codes, ordinances, and other laws
30 adopted by a city, county, city and county, municipality, or local
31 agency regarding spyware and notices to consumers from
32 computer software providers regarding information collection.

33 22947.5. The provisions of this chapter are severable. If any
34 provision of this chapter or its application is held invalid, that
35 invalidity shall not affect any other provision or application that
36 can be given effect without the invalid provision or application.

37 ~~SEC. 2.~~

38 SEC. 3. This act is an urgency statute necessary for the
39 immediate preservation of the public peace, health, or safety

- 1 within the meaning of Article IV of the Constitution and shall go
- 2 into immediate effect. The facts constituting the necessity are:
- 3 Because of the severe threat of personal identity theft and the
- 4 potential invasion of the privacy of all Californians who use the
- 5 Internet, it is necessary that this act take effect immediately.

